



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 17, 2013

Mr. David F. Brown
Counsel for the Texas Windstorm Insurance Association
Ewell, Bickham & Brown, L.L.P.
111 Congress Avenue, 28th Floor
Austin, Texas 78701

OR2013-21957

Dear Mr. Brown:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 509136 (TWIA ID# 000156).

The Texas Windstorm Insurance Association (the "association"), which you represent, received a request for all documents related to specified claims for damages. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege; [and]

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(3), (16), (17). The submitted information contains checks that are subject to subsection 552.022(a)(3), an attorney fee bill that is subject to subsection 552.022(a)(16), and court-filed documents that are subject to subsection 552.022(a)(17). These documents must be released unless they are made confidential under the Act or other law. *See id.* You seek to withhold this information under section 552.103 of the Government Code. You further seek to withhold the attorney fee bill subject to subsection 552.022(a)(16) and one of the court-filed documents subject to subsection 552.022(a)(17) under section 552.107 of the Government Code. However, sections 552.103 and 552.107 are discretionary exceptions and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, none of the information subject to section 552.022 may be withheld under section 552.103 or section 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence to the information you have marked that is subject to subsection 552.022(a)(16) and subsection 552.022(a)(17). As you raise no other exceptions to disclosure of the remaining information subject to section 552.022, which we have marked, it must be released. Finally, we will also address your arguments against disclosure for the information not subject to section 552.022.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert the information you have marked that is subject to section 552.022 of the Government Code should be withheld under rule 503 of the Texas Rules of Evidence. You assert the information at issue consists of privileged attorney-client communications between the association's attorneys and association agents, auditors, and employees in their capacities as clients. You state the communications at issue were made for the purpose of the rendition of legal services to the association. You indicate the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on your representations and

our review, we find you have demonstrated the applicability of the attorney-client privilege to the attachment we have marked. Thus, the association may generally withhold the attachment we have marked under rule 503 of the Texas Rules of Evidence. We note, however, the information we have marked consists of an attachment to an e-mail communication and this attachment has been shared with non-privileged parties. Furthermore, this attachment is separately responsive to the request. Therefore, to the extent this attachment exists separate and apart from the otherwise privileged e-mail communication to which it is attached, the association may not withhold it under rule 503 of the Texas Rules of Evidence. If this attachment does not exist separate and apart from the privileged communication to which it is attached, the association may withhold it under rule 503. Upon review, we find you have not demonstrated how the remaining information at issue documents an attorney-client communication for purposes of rule 503. Accordingly, the remaining information at issue may not be withheld on that basis. As you raise no other exceptions to disclosure for this information, it must be released.

Section 552.103 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You state, and provide documentation showing, prior to the association's receipt of the instant request, a lawsuit styled *Brownsville Indep. Sch. Dist. v. Tex. Windstorm Ins. Ass'n, et al*, Cause No. 2012-DCL-08605-A, was filed and is currently pending against the association in the 107th District Court of Cameron County, Texas. Therefore, we agree litigation was pending on the date the association received the present request for information. You also state the information at issue pertains to the substance of the pending litigation. You further explain the plaintiff in the lawsuit has requested the same information in discovery requests. Based on your representations and our review, we find the information at issue is related to the pending litigation. Therefore, we conclude section 552.103 is generally applicable to the remaining information.

We note, however, the opposing party has seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party has seen or had access to information relating to the anticipated litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Upon review, we find the information we have marked was seen by the opposing party to the pending litigation and may not be withheld under section 552.103. However, the remaining information at issue may be withheld under section 552.103 of the Government Code.² We also note the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the association must release the information we have marked pursuant to section 552.022 of the Government Code. The association may withhold the information we have marked pursuant to Texas Rule of Evidence 503, if the marked information does not exist separate and apart from the otherwise privileged communication to which it is attached. With the exception of the information we have marked for release, the association may withhold the remaining information under section 552.103 of the Government Code.

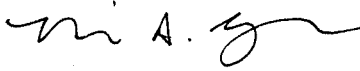
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at <http://www.texasattorneygeneral.gov/open/>

²As our ruling is dispositive, we need not consider your remaining arguments against disclosure of this information.

[orl_ruling_info.shtml](#), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "N. A. Ybarra", with a stylized flourish at the end.

Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/ac

Ref: ID# 509136

Enc. Submitted documents

c: Requestor
(w/o enclosures)